Editor's note: 83 I.D. 280; Appealed -- reversed, Civ. No. 77-1431-R (C.D.Cal. Aug. 20, 1979)

UNITED STATES v. ELODYMAE ZWANG
UNITED STATES v. DARRELL ZWANG

IBLA 71-189 Decided July 9, 1976

Appeal from recommended decision of Administrative Law Judge Graydon Holt dismissing charges of contest complaints that contestees violated the acreage limitation in the Desert Land Act; joint appeal from decision of the Administrative Law Judge granting contestees 160 acres of the 240 acres disputed in each entry.

Recommended decision rejected; entries as contested canceled; joint appeal dismissed.

1. Administrative Procedure: Adjudication -- Contests and Protests: Generally -- Desert Land Entry: Generally -- Res Judicata -- Rules of Practice: Government Contests

   A federal district court jury verdict in a suit to cancel desert land patents, that the entrymen and their purchaser under an illegal executory contract did not commit fraud against the United States, does not

collaterally estop this Department from adjudicating a contest grounded on the illegal executory contract against the purchaser's own entry, because the legal standard applicable in the subsequent contest is different than that in the fraud action -- a desert land entry can be subject to cancellation for acts that do not constitute fraud.

2. Desert Land Entry: Generally -- Words and Phrases

"Hold by assignment or otherwise." The purchaser of desert land under an illegal executory contract to convey the land subsequent to patent "holds" that land within the meaning of the acreage limitation of section 7 of the Desert Land Act, as amended, 43 U.S.C. § 329 (1970).

3. Community Property -- Desert Land Entry: Generally

Rights under an executory contract to acquire property entered into by the

husband alone are presumed to be community property under California law, and a conveyance as community property to husband and wife in settlement of litigation regarding the contract corroborates the presumption; both spouses stand on equal footing with respect to charges, based on the executory contract, of violating the acreage limitations in section 7 of the Desert Land Act, 43 U.S.C. § 329 (1970).

4. Desert Land Entry: Cancellation -- Rules of Practice: Government Contests

In the case of a desert land entry contestee who violates the 320-acre limitation on holding desert land because he is the "purchaser" of two other 320-acre entries under an illegal executory contract to convey after patent, all entries held by the "purchaser" are subject to cancellation, and the Department may proceed by way of contest against the "purchaser's" own entry, which was not a subject of the illegal contract.

5. Desert Land Entry: Cancellation -- Desert Land Entry: Final Proof

The doctrine of voluntary rescission -- which allows an entryman, who was, although in good faith, party to a contract that violated the desert land law, to proceed to the merits of his proof upon repudiation of the contract -- will not be applied when: (1) repudiation of the contract was not truly voluntary; (2) the rescission occurred long after the entries' lives expired; (3) the illegal contract involved a complex of four entries; and (4) no other mitigating circumstances are present.

APPEARANCES: Milton N. Nathanson, Esq., Field Solicitor, Riverside, California, for contestant-appellant; Ted R. Frame, Esq., of Frame & Courtney, Coalinga, California, for contestees-respondents.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

On January 6, 1955, the predecessors and assignors to Elodymae and Darrell Zwang entered land in section 19, T. 4 S., R. 16 E., S.B.M., California, under the provisions of the Desert Land Act, as

amended, 43 U.S.C. § 321 et seq. (1970). 1/ The entries were suspended, and then extended, and the Zwangs filed final proof May 17, 1961. After an initial remand to the land office by the Bureau of Land Management's Division of Appeals, the Bureau held that the Zwangs' proof demonstrated a well with the capacity to irrigate only 80 of the 320 acres in each entry. On the Zwangs' appeal, the Assistant Solicitor for Land Appeals set aside the Bureau's decision and remanded the case. He held that the Zwangs' assertions that their wells could adequately irrigate more than 160 acres created an issue of fact that required notice and a hearing under the Department's contest procedures. Elodymae Zwang, A-30201 (February 3, 1965).

The Bureau filed contest complaints on February 14, 1969, 2/ against 240 acres of each entry, i.e., not including the 80 acres

1/ Elodymae Zwang's entry R(LA)-096387 embraced lots 1 and 2 of the SW 1/4, and the SE 1/4, section 19, T. 4 S., R. 16 E., S.B.M., California, containing 320 acres. Darrell Zwang's entry R(LA)-096388 embraced lots 1 and 2 of the NW 1/4, and the NE 1/4, section 19 of the same township.

The Los Angeles Land Office approved the assignment of R(LA)-096388 from Pat H. Baker to Darrell Zwang, and the assignment of R(LA)-096387 from Willard E. Baker to Elodymae Zwang, by decisions dated December 22, 1958.

2/ The Zwangs had in the meantime demanded issuance of patents for the entries under section 7 of the Act of March 3, 1891, as amended, 43 U.S.C. § 1165 (1970), which provides, "* * * after the lapse of two years from the date of the issuance of the receipt [on final proof] * * *, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered * * *." The Bureau had rejected the demand by letter March 5, 1965, on the ground that the original land office decision rejecting the final proof within

in each entry approved in the Bureau's earlier decision. The complaints charged:

> a) The water supply developed for the entry is insufficient for the irrigation of all the irrigable land embraced therein.
>
> b) An irrigation system adequate to irrigate all of the irrigable land embraced in the entry has not been constructed.

In late 1969, after the contests had been set for hearing, the Acting Regional Solicitor moved that the Departmental Hearing Examiner 3/ stay the hearing until the Department completed an investigation into the possibility that the Zwangs had, by virtue of contracts entered into in 1961, violated the provisions of the Desert Land Act limiting to 320 acres the amount of land any one person could hold under the Act. 43 U.S.C. § 329 (1970).

The Hearing Examiner, citing the Department's authority to initiate contest at any time prior to patent, denied the postponement motion and offered to hold the record open for a reasonable

---

fn. 2 (Continued)
2 years of the issuance of receipt, and the subsequent appeals on the rejection, had tolled the running of the 2-year period.

The Zwangs' suit for a writ of mandamus compelling issuance of patents for the full acreage in each entry was dismissed, and that dismissal affirmed in Zwang v. Udall, 371 F.2d 634 (9th Cir. 1967).

3/ The title "Hearing Examiner" has since been changed to "Administrative Law Judge" by order of the Civil Service Commission. 37 FR 16787 (August 19, 1972).

time to allow amendment of the complaints. After a 3-day hearing, the Hearing Examiner issued a decision on January 7, 1971, dismissing the contests in part and rejecting the patent applications in part. He rejected the applications for the E 1/2 E 1/2 of the section, holding that the NE 1/4 NE 1/4 of the section could not be irrigated with the existing ditch system, and that "while it might be theoretically possible to use [the SE 1/4 NE 1/4 and the E 1/2 SE 1/4], they will not be irrigated and utilized in a farming operation." Dec. I, at 8.

The Hearing Examiner dismissed the complaints against Lot 1 of the NW 1/4 and Lot 1 of the SW 1/4 of the section based on contestant's agricultural expert's crop plan. Dec. I, at 5 n. 1. He then adopted the irrigation ditch water loss figures of contestees' witnesses, recomputed the irrigable acreage on that basis, and dismissed the complaints against the W 1/2 E 1/2 of the section. Dec. I, at 6. Both parties appealed the decision.

Subsequent to the hearing the United States moved to amend contest complaint R(LA)-096388 against Darrell Zwang to add a third charge: that by entering into an agreement with Joseph and Bernadine Lyttlein 1961 to purchase their desert land entries after patent, Darrell Zwang violated section 7 of the Desert Land Act, as amended, 43 U.S.C. § 329 (1970), by holding more than 320 acres of desert land within the meaning of the Act. The Hearing

Examiner deferred ruling on the issue at the parties' request pending the outcome of Reed v. Morton, 480 F.2d 634 (9th Cir.), cert. denied, 414 U.S. 1064 (1973).

By order of June 28, 1973, this Board remanded both cases for hearing on the issue of whether the contestees had violated sec. 329 under the standards set out in Reed v. Morton, supra. Contestant then moved to amend the contest complaint in R(LA)-096387 to charge Elodymae Zwang with the same violation of sec. 329. The amended complaints, directed against both Zwangs, specifically charged that contestees came to hold more than 320 acres of desert land by the settlement in Lyttle v. Zwang, Civil No. 94079 (Riverside County Superior Court), in which Mrs. Lyttle conveyed land to the Zwangs by grant deed as community property, and by "other activities."

Contestant's motion to amend the complaints was granted over contestees' objection that the motion was untimely, and a hearing was held. In his decision, the Administrative Law Judge ruled that no violation of the statute occurred and dismissed this article of the complaints. Contestant has appealed this ruling.

We treat this issue first, as its resolution could moot the issues on the joint appeal of the original hearing decision. Section 7 of the Act of March 3, 1877, as amended, 43 U.S.C. § 329

(1970), provides in relevant part, "no person * * * shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands * * *."

The Administrative Law Judge made the following findings of fact on this issue. In 1961 Darrell Zwang contracted to buy the 640 acres embraced in the adjoining desert land entries of Joseph and Bernadine Lyttle after patents issued to the Lyttles (Ex. 19, Attachment A). Zwang spent about $ 85,000 perfecting the Lyttles' entries. After patents issued, Mrs. Lyttle (Mr. Lyttle having died) resisted a request to convey the land by filing a quiet title action against Darrell Zwang. The California Court of Appeals had held such a contract unenforceable in Griffis v. Squire, 267 Cal. App. 2d 461, 73 Cal. Rptr. 154 (1968), but granted the improver-purchaser a lien on the property for the amount expended on permanent improvements, taxes and insurance. Dec. II, at 1-2.

The Lyttle-Zwang quiet title case was settled and the debt and lien were satisfied by Mrs. Lyttle's conveyance of half of the patented acreage to the Zwangs on December 16, 1969 (Ex. 24). Knowledge of these facts led the United States to sue to cancel the Lyttles' patents (Ex. X-9). A Federal District Court jury held that no fraud was committed and that the patents should not be canceled. United States v. Lyttle, et al., Civil No. 70-1522-F (C.D. Cal. December 14, 1972).

After making the above findings, the Administrative Law Judge held (Dec. II, at 2):

> The question now before this administrative body is in effect whether there was fraud by the Zwangs in acquiring 320 acres of the former Lyttle entries and whether this was a violation of the restrictive provisions of the Desert Land Act, 43 U.S.C. 329. At the time of the quiet title suit the Zwangs had a cause of action against Mrs. Lyttle for the time and money they had expended for the benefit of the Lyttle entries. After the entries were patented this cause was settled by the conveyance of a portion of the land which was no longer under the jurisdiction of the Department of the Interior. In these circumstances I conclude that this transaction did not violate the provision of the Desert Land Act quoted above.

[1] In its exceptions to the recommended decision, contestant argues that the Administrative Law Judge incorrectly applied Griffis v. Squire, supra, and California state law to determine the federal law issue of the Zwangs' eligibility under the desert land law. Contestant argues that the 1961 agreement between Mr. Zwang and the Lyttles mandates that this federal law issue be resolved adversely to contestees. Contestant asserts that the 1961 agreement was not entered into in good faith, and that from at least 1961 to 1967 when the Lyttles' entries were patented, Darrell Zwang held more than 320 acres of desert land. Elodymae Zwang, a party to the settlement conveying part of the Lyttles' patented land, "has benefited from the illegal actions of her husband and such fraud should be imputed to the validity of her entry," contestant concludes. In

its reply brief, contestant charges that Mrs. Zwang violated the holding limitation, based on California community property law.

Contestees argue in response: (a) that the United States is estopped by the judgment and verdict of the District Court from relitigating any of the issues decided there, including whether contestees held more than 320 acres within the meaning of sec. 329 (Reh. Ex. X-12, Part VI. C.); (b) Mr. Zwang's contract with the Lyttles was never concealed, nor was it consummated; and (c) Mrs. Zwang had no role in the agreement with the Lyttles until the settlement subsequent to patent. Contestees raised the estoppel issue at the hearing (Tr. 350-51), but the Administrative Law Judge apparently found it unnecessary to rule on the question because of his resolution of the case.

Contestant in its reply argues that collateral estoppel does not apply to the "holding" issue, as: (1) that issue was not necessarily decided, and should not be assumed to have been decided, by the general verdict returned by the District Court jury; and (2) collateral estoppel does not apply to the Secretary's authority to initiate proceedings in relation to the patenting of public lands, citing United States v. U. S. Borax Co., 58 I.D. 426 (1943) 4/ (Reply Brief at 5-6).

4/ In Borax the Department rejected the contestee's claim of res judicata, i.e., a bar to the entire subsequent proceeding. Here the subsequent proceeding is a different "cause of action" upon

The Borax case deals only with the effect of a prior administrative determination. As was held in United States v. Williamson, 75 I.D. 338, 342 (1968), "prior to [passing of legal title], findings of fact and decisions by the Secretary or his subordinates are subject to reexamination and revision in proper cases. * * *" (Emphasis added.) We reject contestant's argument that a Federal District Court judgment to which the Department is a party will not collaterally estop the Department on the issues decided. See, e.g., United States v. McClarty, 17 IBLA 20, 43, 81 I.D. 473, 482 (1974).

Collateral estoppel applies, however, only to issues which were necessarily decided by the judgment and verdict in the first action. Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir.), cert. denied, 400 U.S. 846 (1970); Happy Elevator No. 2 v. Osage Const. Co., 209 F.2d 459 (10th Cir. 1954); Burchett v. Bower, 355 F. Supp. 1278 (D. Ariz. 1973). 50 C.J.S. Judgments § 719 (1947). United States v. Fleming, 20 IBLA 83, 98 (1975). This limitation on collateral estoppel is important when considering the effect of a general jury verdict. Herman v. United States, 289 F.2d 362, 368 (5th. Cir. 1961).

In the U.S. District Court litigation to cancel the Lyttle patents, the complaint (Ex. X-9) was grounded in fraud. Consistent

---

fn. 4 (continued)
a different charge, so only an issue of collateral estoppel is raised. See United States v. International Building Co., 345 U.S. 502, 505 (1953).

with the complaint and the pretrial order (Ex. X-12), the judgment of the jury was "that fraud was not committed against the United States and that the patents issued to [the Lyttles] should not be canceled" (Ex. X-13). We regard the verdict as conclusive on the question of whether Darrell Zwang committed fraud; the issue was explicitly and necessarily decided. 5/ The jury's verdict does not mean, contrary to contestees' argument, that each and every issue posited in the pretrial order has been finally decided. See RESTATEMENT OF JUDGMENTS § 68(1)-(o) (1963). Specifically, it was not essential for the jury to determine that Darrell Zwang did not hold more than 320 acres of desert land (Ex. X-12, Part VI. C.), in order to conclude that no fraud was committed against the United States.

Collateral estoppel does not foreclose an action on the same transaction or set of facts when the subsequent action requires the

5/ We note that at the time of the District Court jury verdict, December 14, 1972, the Ninth Circuit Court of Appeals had not issued Reed v. Morton, supra, which reversed a District Court opinion, and held the desert land entries at issue for cancellation because of a development-conveyance contract covering the entries that the Circuit Court found to be fraudulent against the United States. The District Court opinions reversed in Reed (United States v. Hood Corp., Civil No. 1-67-97, and Reed v. Hickel, Civil No. 1-65-86 (D. Idaho, July 10, 1970)), defined the scope of fraud in the acquisition of desert land at the time of the District Court action in this case. We would be disinclined to apply collateral estoppel to a verdict relying on subsequently invalidated precedent. See Griffin v. State Board of Education, 296 F. Supp. 1178, 1182 (E.D. Va. 1969). This record, however, including the pretrial conference order (Ex. X-12), contains no indication that the District Court opinion in United States v. Hood Corp., supra, and Reed v. Hickel, supra, was in fact relied on in United States v. Lyttle, et al., supra.

application of a different legal standard. Peterson v. Clark Leasing Corp., 451 F.2d 1291 (9th Cir. 1971). The issue now before the Board requires the application of a different, less stringent legal standard; even though fraud is not committed, a desert land patent applicant must "proceed by means sanctioned by the desert land law." United States v. Law, 18 IBLA 249, 271, 81 I.D. 794, 805 (1974). Actions which do not constitute fraud may require rejection of the purchase application and cancellation of the entry. The District Court jury may well have thought that Zwang violated the holding limitation, but found the requisite proof of fraudulent intent lacking.

[2] One such provision of the desert land law that the entryman may not violate, whether in good or bad faith, is the prohibition in sec. 329, that "no person * * * shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands * * *." (Emphasis added.) The Administrative Law Judge was correct in saying that the Lyttle-Zwang litigation was settled "by the conveyance of a portion of the land which was no longer under the jurisdiction of the Department of the Interior" (Dec. II, at 2). We agree with his implication that the acquisition of private land, which was or was not patented under the desert land law, cannot per se disqualify a desert land entryman, by its addition to his entry acreage, under the 320-acre rule. This does not, contrary to the Administrative Law Judge's

conclusion, end the analysis. To this extent contestant is correct in its assertion (Exceptions at 3) that the Administrative Law Judge incorrectly used Griffis v. Squire, supra, to conclude that no violation of the acreage limitation occurred. The issue is, did the Zwangs, by virtue of the contract to develop and receive conveyance of the Lyttle entries, hold "by assignment or otherwise" more than 320 acres during the life of the Lyttle entries.

We hold that Darrell Zwang did so hold more than 320 acres of desert land during the period both his and the Lyttles' entries were running. Under the terms of the contract to develop and receive conveyance (Ex. 19, Attachment A), Zwang promised to pay $ 25,600 in addition to the costs of improvement of the land in the two Lyttle entries, in exchange for the Lyttles' conveyance of the two parcels to him, conditional only on the Lyttles' acquiring patents after Zwang improved the land. Zwang had all the rights and duties of an entryman under the contract, and we hold that he "held" those entries "by assignment or otherwise" within the meaning of the proscription in sec. 329. United States v. Shearman, 73 I.D. 386, 427-28 (1966), sustained sub nom. Reed v. Morton, supra. 43 CFR 2521.3(c)(2) (1975), formerly 43 CFR 232.17(b) (1964); Herbert C. Oakley, 34 L.D. 383 (1906). From the time the agreement with the Lyttles was signed in 1961 until the Lyttles' entries were patented in 1967, Mr. Zwang held an interest in more than 320 acres of desert land by virtue of his own entry and the contract with the Lyttles.

[3] The amended contest complaint in R(LA)-096387 similarly charged Elodymae Zwang with a violation of the 320-acre limitation by virtue of the same set of facts, namely the agreement and the settlement of the litigation with the Lyttles. In the order remanding the cases for the second hearing, we noted that Elodymae Zwang may have violated sec. 329 if her husband did, since California is a community property state. Contestant argues that although Mrs. Zwang was not a party to the contract in 1961, she received the conveyance from Mrs. Lyttle in their 1969 settlement as a co-owner, and "has benefited from the illegal actions of her husband and such fraud should be imputed to the validity of her entry" (Contestant's Exceptions at 7).

Mr. Zwang's actions were illegal, but that does not mean that they were fraudulent. The District Court jury found that "no fraud was committed" in the transaction at issue. It is unnecessary to dispute or avoid that finding, however, in order to rule that Darrell Zwang's actions are to be ascribed to her on the issue of excess holding. Under standard community property law, the earnings of the husband during the marriage are presumed to be community property. Earnings include contractual benefits arising from the employment, labor and management of the husband. Cal. Civil Code § 5110 (1970). This statutory presumption could be rebutted by a showing that the property was acquired by the proceeds of the husband's separate property. See Thomasset v. Thomasset, 122 Cal.

App. 2d 116, 264 P.2d 626 (1954). The record contains nothing indicating that the contract at issue was to be acquired as separate property, i.e., by the transfer in form of separate funds. Further, the record does indicate that the time and management, if not the money as well, invested by Mr. Zwang in the Lyttle entries are "earnings" under California community property law. The Lyttle parcels acquired in the settlement are community property, and are so described in the settlement deed; the presumption is corroborated in this case. More importantly, in the absence of evidence to the contrary, the contract rights under the 1961 agreement executed by Darrell Zwang are presumed to have been community property.

Thus, insofar as Darrell Zwang held more than 320 acres of desert land by holding the Lyttle entries under the 1961 agreement, so did Elodymae Zwang. Henceforth the discussion will treat both contestees equally; Elodymae Zwang's entry R(LA)-096387 stands or falls with the validity of her husband's entry R(LA)-096388.

[4] Not all contracts or agreements that violate provisions of the Desert Land Act will be held against the entryman. The Board, in appropriate circumstances, will recognize the voluntary rescission of such an illegal agreement and proceed to the merits of the final proof, provided the entryman executed the illegal agreement in good faith. United States v. Law, supra at 260-61, 81 I.D. at 800; Lois L. Pollard, A-30226 (May 4, 1965); Blanchard v. Butler, 37 L.D. 677 (1909); Herbert C. Oakley, supra.

In each of these cases the Department was proceeding against the entries which were the subjects of the illegal agreements at issue. See also United States v. Grigg, 19 IBLA 379, 82 I.D. 123 (1975). In Grigg, one of the entrymen was a partner in the firm holding the illegal assignment, but his entry was included in the assignment. This is the first case in which the purchaser under an illegal executory agreement has had his own entry, which was not subject to the agreement, challenged on that basis. We hold this manner of proceeding proper. This case involves not just an illegal contract to convey desert land subsequent to patent, but a violation of the 320-acre limitation. In such a case each and every entry held by the purchaser, whether or not held under the illegal agreement, is vulnerable to challenge by virtue of the excess holding. The violation and the sanction are against the party, not solely against the entry. See United States v. Morris, 19 IBLA 350, 375-76, 82 I.D. 146, 158 (1975); United States v. Law, supra at 263-64, 81 I.D. at 801.

[5] We proceed to examine whether the doctrine of voluntary rescission is applicable here. In Lois L. Pollard, supra, the entrywoman contracted to convey the desert land entry, subsequent to patent, to the contractor who promised to improve and reclaim it. The entrywoman obtained a state court injunction prohibiting the contractor from going on the entry and returned the down payment because of the contractor's default in performance of the

required cultivation and reclamation work. Although the rescission was not prompted by recognition of the illegality of the executory contract, the Department applied the rule, citing Blanchard v. Butler, supra. 6/ It held:

> After the litigation ended, Mrs. Pollard was in exactly the same position she would have been in if she had voluntarily rescinded the contract. * * * It would be unduly harsh to hold that an entryman who in good faith pursues a legal remedy which restores the status quo is to be thereafter denied the shelter of a Departmental policy available to one who has violated the same regulation but corrects the violation on his own after learning of his error. * * *

The BLM was instructed, if it had no reason to challenge appellant's assertions of good faith, to process her final proof, that is, proof based on acts of improvement and reclamation not made under the illegal contract.

In United States v. Law this Board declined to apply the doctrine of voluntary rescission to four entrymen who entered lease-option agreements containing the following terms. The single lessee promised to pay rental, reclaim and cultivate the four entries, pay all irrigation district fees and taxes, and assist in the presentation of final proof, in exchange for complete control over the entries

6/ In Blanchard the offending homestead entryman rescinded the executory contract and tendered back the down payment upon learning of its illegality. The Department dismissed a contest against the final proof which was based on the illegal agreement and which had been filed by the prospective "purchaser" of the entry.

for the 15-year lease term and the right to purchase and receive title to the lands at that time. The parties rescinded the lease-option agreement more than a year after final proof was filed. The Board held the doctrine inapplicable because: the life of the entries had run; contest had been filed prior to rescission; the entries would pass to patent subject to huge liens in favor of the lessee; and the illegal contract involved five entries. United States v. Law, supra at 262-68, 81 I.D. at 800-03.

The present case lies between the two just described. The situation is less egregious than Law in that: there are no liens or prospective foreclosures on these, the contractor's own entries; the scale of the illegal contract and project is smaller than that in Law; and the contract collapsed prior to the filing of the contest. However, the present case is more egregious than Pollard in that the rescission was not voluntary; the lives of the entries have run; a lien was asserted to acquire one of the other entries; and there is no change to restore the status quo and for the entryman to show the "sincerity of his repentance," the phrase used in Law and derived from Blanchard v. Butler, supra at 680.

Contestees argue that this issue is controlled by the Department's decision in Herbert C. Oakley, supra. There the entryman had contracted to sell after patent, and the contract was rescinded only after the entry's life expired. The Department held (34 L.D. at 388):

> In view of the doubt cast upon the validity of the original contract and the further fact that there is now on file with the Department an absolute revocation thereof, and the further finding of good faith on the part of the entryman at the time he initiated his claim, the Department is of opinion the proof offered, if in other respects satisfactory, should be accepted.

Law and Oakley, read in conjunction, indicate that the date of rescission is not conclusive, and is one of the facts, although an important one, used in judging the applicability of the rule of voluntary rescission. See Lois L. Pollard, supra. We agree with contestant that Oakley is not controlling here, 7/ chiefly because the "doubt cast on the validity of the original contract" in Oakley was not, as in Law and in this case, solely the violation of the desert land law itself. There, the Department emphasized that the contract was unenforceable as an initial matter because it was entered into by a partner of the entryman, who had no interest in the entry, and no authority to contract on his behalf. This fact militated for recognizing the entryman's rescission of the contract. Thus, while Oakley is not controlling here, it and the Law, Pollard and Blanchard cases establish the relevant factors in ruling on

---

7/ Contestant argues that this case is distinguishable from Oakley because Mr. Zwang did not contract to convey the land in his (or his wife's) entry after patent, as Oakley did (Reply brief at 6). We reject this basis for distinction; if this were a ground for distinction, Law, Pollard and Blanchard would be inapplicable too. Further, the implication is that the Department will not apply the doctrine of voluntary rescission to land not embraced in the illegal agreement. This is untenable. If the sanction for violating the desert land law can be applied to land not contained in the illegal agreement (as we held supra), then so can the "defense" of voluntary rescission be applied to such land.

whether the Department will honor the revocation of an illegal contract.

Contestant argues that here the contract was never rescinded but was in fact consummated in part, pointing to the Zwangs' ownership of half of the Lyttle entries through the settlement of their litigation (Contestant's reply brief at 6). Contestees argue that the conveyance in settlement was based on Mr. Zwang's counterclaim of a lien for the value of the improve-ments made, as established by California law, Griffis v. Squire, supra, and that the settlement cannot be considered as consummation in any event because the agreement provided for the conveyance of both Lyttle parcels.

We agree with contestees that the agreement was not fully consummated; Mr. Zwang's pursuit of his counterclaim remedies as a defendant in the quiet title action was not in execution of the contract. On the other hand, we do not think that the agreement was repudiated in a manner that invokes the doctrine of voluntary rescission in contestees' favor, for the following reasons.

First, the agreement was never truly rescinded by contestees. In fact, in 1967 after the Lyttles received their patents Mr. Zwang made written demand on Mrs. Lyttle (on her own behalf and as executrix of her late husband's estate) to convey the two parcels pursuant to the contract (Tr. 387; Ex. 19, Attachment B). For this

purpose Mr. Zwang had placed his promissory note for $ 20,600 in escrow pursuant to the written agreement. Rather, the contract was repudiated by Mrs. Lyttle when she refused to convey and filed the quiet title action (Ex. 18).

We do not regard contestee's pursuit of his legal remedies by way of counterclaim to the quiet title action as evidence against rescission of the contract. Contestee is obviously not to be penalized for having pursued his rights under state law to prevent Mrs. Lyttle's unjust enrichment at his expense. Griffis v. Squire, supra at 470-73, 73 Cal. Rptr. at 160-62. On the other hand, contestee's abandonment of his contract right to a conveyance of both entries is less than conclusive evidence of voluntary rescission. Contestee never acted to rescind the contract on his own; his only acts were in response to the information that the vendor had already repudiated the contract as unenforceable. We do not in this case have truly voluntary rescission.

Second, the rescission of the contract, such as it was, did not come until long after the expiration of the life of both sets of entries. While the timing of the repudiation is explained by Zwang's testimony that the parties did not until 1967 learn of the agreement's potential invalidity, it is not excused thereby. In United States v. Law, supra at 262, 284, 81 I.D. at 800, 811, the majority rejected the argument that rescission after the life of

the entries has expired is adequately excused by the fact that the parties only then learned of their violations of the desert land law. The Board emphasized that in Pollard the status quo was restored, and the entrywoman was able, after she repudiated the contract at issue there, to proceed to reclaim the entry herself. It is insufficient that the parties have terminated the contract upon learning of its illegality; the entryman must still be able, subsequent to repudiation of the contract, to "proceed [with reclamation and cultivation] by means sanctioned by the desert land law" within the life of the entry. United States v. Law, supra at 271, 81 I.D. at 805.

Third, the illegal agreement taken with the contestees' claims embraced a block of four entries, totaling 1,280 acres. To allow these entries to go unchallenged would decimate the express policy of the Desert Land Act to limit acquisitions under the Act to small unit farms. In Pollard the illegal contract to convey stood alone; here there was an illegal contract to convey and a violation of the 320-acre holding limitation.

Fourth, in Law the Board canceled the entries notwithstanding the mitigating factor that the contractor-developer and the entrymen had discussed their plan of development with Bureau officials. Even so the challenge to the entries was sustained. While the agreement here was not deliberately hidden from Bureau scrutiny,

no such mitigating factor as tacit approval or the like exists in this case.

Taken together, these factors convince us that the doctrine of voluntary rescission is not to be applied in this case. We reiterate that this holding is not based on any finding of bad faith or fraudulent action on the part of the entrymen. But Lois L. Pollard, supra, emphasizes that the doctrine of voluntary rescission may be applied in certain circumstances, as long as the sine qua non of good faith on the part of the entryman is established. Good faith is required, but it alone is insufficient to invoke the doctrine. We are bound by the District Court jury ruling that Mr. Zwang and the Lyttles committed no fraud against the United States (Ex. X-13). The record is undisputed that Mr. Zwang was not aware of the acreage limitation or the illegality of the executory sale agreement (Tr. 381, 394, 436). These facts show that there was no bad faith, but they do not of themselves invoke the doctrine of voluntary rescission on contestees' behalf, particularly since the statutory lives of the entries had expired.

As the foregoing discussion indicates, we find that the Administrative Law Judge erred when he limited his consideration: (1) to whether or not the conveyance in settlement of the Lyttle-Zwang lawsuit generated a holding in violation of the acreage limitation; and (2) to whether or not fraud was committed by the Zwangs (Dec. II,

at 2). Accordingly, we decline to follow the recommendation in the Administrative Law Judge's second decision, we set aside that decision, and we sustain paragraph 5 of the amended complaints in each contest. The doctrine of voluntary rescission is not applicable in this case to excuse the contestees' violation of the statutory acreage limitation.

Because we find that the entries, as challenged, must be canceled, it is unnecessary to reach the issues presented by the joint appeal from the first decision of the Administrative Law Judge regarding the extent of the entries that can be farmed with contestees' irrigation system and crop plans. The joint appeal on these issues is dismissed as moot.

One issue remains to be discussed. In the decisions on appeal here, the Riverside Land Office accepted contestees' proof on 80 acres in each entry. The contest complaints issued February 14, 1969, challenged the adequacy of contestees' proof on 240 acres of each entry ("Lot 1 of the NW 1/4, and the NE 1/4 of said section 19" in R(LA)-096388, and "Lot 1 of the SW 1/4, and the SE 1/4 of said section 19" in R(LA)-096387). Similarly, the contest complaints were amended to charge violation of the 320-acre limitation by adding subsection (c) to paragraph 5 of each complaint, and they did not modify or enlarge the acreage under contest to include the other 80 acres in each entry.

The rulings above regarding the illegal agreement and the holding of more than 320 acres appear to apply equally to the 80 acres of each entry not contested. However, because this acreage was not joined in the contest, either by complaint or as a part of the hearing, 8/ we cannot now rule on the validity of these portions of the entries. This Board has de novo review authority over matters of law and fact litigated before an Administrative Law Judge. State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971). Further, the Department has the authority to reopen and reexamine findings and conclusions of Departmental officials, until legal title passes, to determine what rights have been earned under the public land law. United States v. Meyers, 17 IBLA 313, 316 (1974); United States v. Grediagin, 7 IBLA 1, 3-4 (1972); United States v. Williamson, supra at 342-43. This Board's authority does not extend, however, to making initial findings on matters not at issue in the contest. See Harold Ladd Pierce, 3 IBLA 29 (1971); see also United States v. Northwest Mine & Milling, Inc., 11 IBLA 271, 274-75 (1973).

In such a case as this, in which contest is the proper manner of proceeding (Johnnie E. Whitted, 61 I.D. 172, 174 (1953); 43 U.S.C. § 329 (1970)), the law requires proper notice and opportunity for hearing before final Departmental action in the matter.

8/ United States v. Northwest Mine & Milling, Inc., 11 IBLA 271, 274-75 (1973).

E.g., United States v. Williamson, supra at 342, 350. See Orchard v. Alexander, 157 U.S. 372, 383 (1895). We see no objection to proceeding against the remaining 80 acres of each entry, 9/ and we presume that the proceeding will be governed by our rulings above, 10/ but we cannot act against these portions of the entries without their having been contested, and the contestees having had notice and an opportunity for hearing in the matter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision of January 16, 1974, is set aside, and for the

9/ As indicated in footnote two, supra, contestees have already sued for mandamus to compel issuance of patents, and lost. Zwang v. Udall, 371 F.2d 634 (9th Cir. 1967). We do not feel that the statute at issue in that litigation bars contest against the 80 acres in each entry not previously contested. The statute provides that mandamus will lie when 2 years have passed with "no pending contest or protest against the validity of such entry * * *." Section 7 of the Act of March 3, 1891, as amended, 43 U.S.C. § 1165 (1970). In Zwang v. Udall, supra, the Ninth Circuit held that a contest or protest within the meaning of the Secretary's regulations was pending against the entry within 2 years of the issuance of receipt, even though a formal contest complaint had not been filed.

In this proceeding, it could be argued that there was a pending contest or protest "against the validity of [each] entry," even if each subdivision had not been explicitly contested. Further, the filing of a formal contest complaint may not be essential to initiate a contest or protest for the purposes of the statute. Contest against these entries may have been pending since the October 23, 1963, decision of the Riverside Land Office on appeal here. However, we do not decide the issue.

10/ As to the application of collateral estoppel in any future contest, see Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 47-49 (1897), and contestees' brief at 3, filed herein May 30, 1974.

reasons set out above the entries, to the extent contested by the complaints of February 14, 1969, as amended, are canceled.

Frederick Fishman
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE GOSS, CONCURRING SPECIALLY:

I concur in the above decision and point out the possibility that the appellants could, at some point, be reimbursed for valuable improvements should a third party acquire the land. Cf. Mrs. Hazel Ingersoll Hall, 4 IBLA 177, 178 (1971).

Joseph W. Goss
Administrative Judge